



Self-Regulatory Organizations; Nasdaq PHLX, LLC; Notice of Filing and Immediate
Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule at Options 7

April 21, 2021

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on April 13, 2021, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule at Options 7, as described further below.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7. First, the Exchange proposes to amend the routing fees to Nasdaq BX Options ("BX"), which are set forth in Options 7, Section 7. Second, the Exchange proposes a non-substantive change in Options 7, Section 4 to add rule text that will make clear applicable pricing.

BX Routing Fees

Options 7, Section 7 sets forth the fees for routing contracts to markets other than Phlx. The Exchange proposes to amend the BX Routing Fee.

Currently, Non-Customers³ are assessed a \$0.99 per contract Routing Fee to any options exchange. Customers⁴ are currently assessed a Routing Fee to The Nasdaq Options Market ("NOM") of \$0.13 per contract ("Fixed Fee") in addition to the actual transaction fee assessed. Customers are also currently assessed a Routing Fee to BX of \$0.13 per contract. In addition, as it relates to all other options exchanges, Customers are currently assessed a Routing Fee of \$0.23 per contract ("Fixed Fee") in addition to the actual transaction fee assessed. If the away market pays a rebate, the Routing Fee is \$0.13 per contract. Finally, the Exchange currently pays a credit (equal to the applicable Fixed Fee plus \$0.01 per contract)⁵ to a member organization that

³ The term "**Non-Customer**" applies to transactions for the accounts of Lead Market Makers, Market Makers, Firms, Professionals, Broker-Dealers and JBOs.

⁴ The term "**Customer**" applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation ("OCC") which is not for the account of a broker or dealer or for the account of a "Professional" (as that term is defined in Options 1, Section 1(b)(45)).

⁵ If the away market transaction fee is \$0.00 or the away market pays a rebate, then the Exchange provides the member organization with a credit equal to the applicable Fixed Fee only. Member and member organizations under Common Ownership may aggregate

qualifies for a Tier 2, 3, 4, or 5 rebate in the Customer Rebate Program in Section B of the Pricing Schedule, and routes away more than 5,000 Customer contracts per day in a given month to an away market.

The Exchange now proposes to amend the BX Routing Fee to include the actual transaction fee assessed in addition to the “Fixed Fee” of \$0.13 per contract. The proposed changes will align BX’s Routing Fee with the current NOM Routing Fee.

The Exchange is proposing to recoup the actual transaction fee (in addition to the Fixed Fee) that is incurred by the Exchange in connection with routing orders, on behalf of its member organizations, to BX. Previously, the Exchange retained the rebates paid by BX to recover the costs associated with providing its routing services, did not assess the actual transaction fees charged by BX for Customer orders, and only assessed such orders the \$0.13 per contract Fixed Fee. This is because when orders are routed to BX, such orders are considered as removing liquidity on BX, and BX previously assessed rebates to Customer orders for removing liquidity. In particular, prior to the Recent Rule Change,⁶ Customer orders executed on BX received Penny Symbol Rebates to Remove Liquidity when trading against a Non-Customer, Lead Market Maker, BX Options Market Maker, Customer or Firm that ranged from \$0.00 to \$0.35 per contract,⁷ depending on the volume tier achieved. Customers also previously received Non-Penny Rebates to Remove Liquidity of \$0.80 per contract, regardless of tier and contra-party. As

their Customer volume routed away for purposes of calculating discount thresholds and receiving discounted routing fees.

⁶ See Securities Exchange Act Release No. 91473 (April 5, 2021), 86 FR 18562 (April 9, 2021) (SR-BX-2021-009) (“Recent Rule Change”).

⁷ Participants that execute less than 0.05% of total industry customer equity and ETF option ADV contracts per month would receive no Penny Symbol Rebate to Remove Liquidity in Tier 1. Participants that execute 0.05% to less than 0.15% of total industry customer equity and ETF option ADV contracts per month would receive a \$0.25 per contract Penny Symbol Rebate to Remove Liquidity in Tier 2. Participants that execute 0.15% or more of total industry customer equity and ETF option ADV contracts per month would receive a \$0.35 per contract Penny Symbol Rebate to Remove Liquidity in Tier 3.

part of the Recent Rule Change, the aforementioned rebates were removed from the BX Pricing Schedule and replaced with a maker/taker fee structure where market participants are assessed a rebate or fee for adding liquidity to the market, or charged a fee for removing liquidity from the market.⁸

With this recent change in the structure of BX's Pricing Schedule, the Exchange proposes to align the Routing Fees to BX with the current Routing Fees to NOM. With this proposal, the Exchange will no longer retain rebates paid by BX as BX no longer provides rebates for Customer orders removing liquidity on BX and instead charges a taker fee for such orders. The Exchange will continue to assess the \$0.13 per contract Fixed Fee for routing Customer orders to BX, and will propose to also charge the actual transaction fee assessed by BX.

Finally, the Exchange will continue to provide the routing credit described above to orders that are routed away to BX if the member organization qualifies for a Tier 2, 3, 4 or 5 rebate in the Customer Rebate Program in Section B of the Pricing Schedule, and routes away more than 5,000 Customer contracts per day in a given month. The routing credit will equal the \$0.13 per contract Fixed Fee plus \$0.01 per contract, unless the away market transaction fee is \$0.00 or the away market pays a rebate, in which case the member organization will be entitled to receive a credit equal to the \$0.13 per contract Fixed Fee. Accordingly, the application of the routing credit for BX under this proposal will continue to remain the same as today. For example, if Phlx routes a Customer order in a Non-Penny Symbol for execution on BX, Phlx would charge the member organization for the Customer order the \$0.13 per contract Fixed Fee plus the \$0.65 per contract taker fee, which is the actual transaction fee assessed by BX today for Customer orders taking liquidity, for a total of \$0.78 per contract. Further, if the Phlx member organization meets the qualifications for the routing credit (i.e., qualifies for a Tier 2, 3, 4 or 5 rebate in the Customer Rebate Program, and routes away more than 5,000 Customer contracts

⁸ See note 6 above.

per day in a given month), Phlx would provide the member organization a routing credit of \$0.14 per contract (i.e., the \$0.13 Fixed Fee plus \$0.01 per contract) instead of charging the \$0.78 per contract Routing Fee for the Customer order.

Technical Amendment

The Exchange proposes a non-substantive, technical amendment to Options 7, Section 4, currently titled “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed).” The Exchange now proposes to add a parenthetical that makes clear that SPY pricing is excluded from Section 4 pricing as it is set forth separately in Options 7, Section 3.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange’s proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹¹

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹²

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange’s proposal to amend the BX Customer Routing Fee within Options 7, Section 7 to start charging the actual transaction fee assessed by BX in addition to the current \$0.13 per contract Fixed Fee is reasonable. As a general matter, the Exchange notes that use of the Exchange’s routing services is completely voluntary. In the alternative, member organizations may submit orders to the Exchange as ineligible for routing or “DNR” to avoid

¹¹ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

Routing Fees.¹³ Furthermore, the Exchange operates in a highly competitive market in which market participants can readily select between various providers of routing services with different pricing. In this instance, proposing to assess the actual transaction fee, in addition to the current Fixed Fee of \$0.13 per contract, is reasonable in light of the Recent Rule Change described above where BX no longer provides rebates to Customer orders that are routed to and executed on BX, and instead charges them a taker fee.¹⁴ As proposed, the Exchange would recoup the actual transaction cost it incurs when routing Customer orders to BX in lieu of collecting any rebate paid by BX. Today, the Exchange similarly assesses orders routed to NOM a Fixed Fee of \$0.13 per contract plus the actual transaction fee. As such, the proposal would align the BX Routing Fee with the NOM Routing Fee. The Exchange's proposal to amend the BX Customer Routing Fee within Options 7, Section 7 is equitable and not unfairly discriminatory because the Exchange would uniformly assess the same transaction fee assessed by BX for the Customer order routed to BX plus the current Fixed Fee of \$0.13 per contract.

Lastly, the Exchange believes that its proposal to add the parenthetical to the Options 7, Section 4 header to exclude SPY from Section 4 pricing is reasonable, equitable, and not unfairly discriminatory. The proposed rule change is a non-substantive, technical amendment that will make clear that SPY pricing is set forth separately in the Pricing Schedule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain

¹³ See Options 5, Section 4(a)(iii)(A).

¹⁴ See note 6 above.

competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, the Exchange is proposing to charge Customer orders that are routed to BX the actual transaction fee assessed by BX in addition to the current Fixed Fee of \$0.13 per contract in light of the fee changes under the Recent Rule Change described above where BX no longer provides rebates to Customer orders that are routed to and executed on BX, and instead charges them a taker fee.¹⁵ The proposed changes reflect the need to recover the Exchange's costs associated with providing its routing services. Furthermore, as noted above, the use of the Exchange's routing services is completely voluntary and optional, and the Exchange operates in a highly competitive market in which market participants can readily select between various providers of routing services with different pricing. As such, it is likely that the Exchange will lose market share as a result of the changes proposed herein if they are unattractive to market participants.

The Exchange also does not believe its proposal will impose an undue burden on intra-market competition. As discussed above, the Exchange would uniformly assess the same transaction fee assessed by BX for the Customer order routed to BX plus a Fixed Fee of \$0.13 per contract. Under this proposal, Non-Customer orders would continue to be assessed the \$0.99 per contract routing fee and not be assessed the actual BX transaction fee. The Exchange does not believe its pricing proposal will place any market participant at a relative disadvantage compared to other market participants because the proposed routing fee for Customer orders will actually narrow the difference between the routing fees assessed to Customer and Non-Customer orders routed to BX, as illustrated in the example above.

¹⁵ See note 6 above.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁶ and paragraph (f) of Rule 19b-4 thereunder.¹⁷

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2021-22 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁷ 17 CFR 240.19b-4(f)(2).

All submissions should refer to File Number SR-Phlx-2021-22. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2021-22 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

J. Matthew DeLesDernier,
Assistant Secretary.

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¹⁸ 17 CFR 200.30-3(a)(12).